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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 864.

LOWE BROTHERS COMPANY, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Case Cited

United States v. Piedmont Mfg. Co., 89 Fed. (2d) 296 . . 5, 7

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PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Lowe Brothers Company, a corporation of Ohio, by James B. O'Donnell and William Cogger, its attorneys, respectfully petitions this Honorable Court for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review the judgment of that Court entered in the above cause on November 11, 1937. (R. 47)

The petitioner's application for rehearing was denied December 17th, 1937. (R. 55)

Opinions Below.

The opinion of the United States District Court (R. 30 to 34) is published in 8 F. Supp. 1016. The opinion of the Circuit Court of Appeals (R. 48) is published in 92 F. (2d) 905.

Jurisdiction.

The judgment of the Circuit Court of Appeals was rendered November 11, 1937 (R. 47), and a petition for rehearing was denied December 17th, 1937. (R. 55)

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Where an income tax exceeding $10,000 is collected by credit does the District Court of the United States have jurisdiction of a suit against the United States for its recovery if both the Collector in office when the credit collection was made and the Collector to whom the overpayment credited was paid are out of office at the time the suit is begun.

Statute Involved.

Judicial Code, as amended:

> Sec. 24. The district courts shall have original jurisdiction as follows:
>
> * * * * * * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall

be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

Specification of Error to be Urged.

The Circuit Court of Appeals erred in holding the District Court had no jurisdiction of this suit.

Statement of the Case.

The facts in the case are contained in the allegations of the petition (R. 1-10), admitted in answer (R. 11-14); stipulation of facts (R. 17-28), and special findings of fact by the court at the request of the parties as set forth in entry filed October 22, 1934. (R. 38)

The facts material to the decision of the questions presented in this case are as follows:

The petitioner is a corporation existing under the laws of Ohio, with its principal place of business in the City of Dayton, Ohio, and was incorporated in June, 1929 (R. 38), and acquired the claim herein sued on in a merger, as set forth in allegation I of the Petition. (R. 1)

The petitioner is a successor to Lowe Brothers Company, a corporation incorporated in 1893. The predecessor corporation filed its income and profits tax return for the year 1917, on October 31, 1917, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon; on October 31, 1918, the predecessor filed its income and excess profits tax return for the fiscal year ended September 30, 1918, with the proper Collector of Internal Revenue and paid the tax shown to be due thereon. (R. 38)

On March 15, 1924, the Commissioner of Internal Revenue assessed against Lowe Brothers Company, the predecessor, an additional income and profits tax for the fiscal year 1917 of $31,771.71. (R. 38)

On March 15, 1924, the Commissioner of Internal Revenue signed a schedule of overassessments indicating that

the petitioner's predecessor had overpaid its income and profits tax for the fiscal year ended September 30, 1918, in the amount of $52,710.03. Of said amount the Collector of Internal Revenue, under instruction from the Commissioner, credited the sum of $11,230.14 against the deficiency assessment of $31,771.71 for the fiscal year ended September 30, 1917. The Collector of Internal Revenue applied the credit on April 24, 1924, and the Commissioner approved the credit on May 10, 1924. (R. 38)

On April 2, 1928, the petitioner's predecessor filed a claim for refund for $40,000 for its fiscal year ended September 30, 1917, which claim was formally rejected by the Commissioner on February 1, 1929. (R. 38)

On January 25, 1923, and on February 9, 1923, respectively, petitioner's predecessor filed income and profits tax waivers for the fiscal year ended September 30, 1917. (R. 38)

These waivers expired on April 1, 1924. (R. 38)

This suit is brought against the United States for the reason that Charles M. Dean, who was Collector of Internal Revenue for the First District of Ohio in 1924, was no longer in office as Collector at the time this suit was commenced. (R. 3)

This suit, which is for the recovery of $11,230.14 (R. 3), was commenced May 24, 1930. (R. 1, 10)

The foregoing statement of facts is taken verbatim from the respondent's brief in the Circuit Court of Appeals. To this may be added that the Circuit Court of Appeals in its opinion (R. 48), held that the petitioner was entitled to recover on the merits and that the District Court was in error in that respect but affirmed the judgment on the ground that the District Court had no jurisdiction in the case. (R. 49) This question was not considered by the District Court and was not raised there.

Reasons for Granting the Writ.

The decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar is squarely in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 F. (2d) 296. That case holds a collector does collect a tax by the credit process. The case at bar holds otherwise.

The question of the jurisdiction of the United States District Court is one of great importance because thousands of credits in tax accounts are made in collectors' offices every year and it is important to determine whether taxpayers scattered throughout this wide and extensive country must come to Washington to sue in the Court of Claims or may sue in such cases in the district where they live. In many such cases part of a single liability is collected in case and the balance of it by credit.

For the foregoing reasons it is respectfully submitted that the writ of certiorari should be granted.

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BRIEF FOR PETITIONER.

A reading of the decision of the Circuit Court of Appeals for the Fourth Circuit in *United States* v. *Piedmont Mfg. Co.*, 89 Fed. (2d) 296, and of the decision of the Circuit Court of Appeals for the Sixth Circuit in the case at bar discloses a sharp and square conflict in the interpretation of a statute which confers jurisdiction on the District Courts of the United States.

In the case of the *Reeves Brothers Company* in this court, No. 272, October Term, 1936, a petition for rehearing was filed after the decision of the Circuit Court of Appeals in the *Piedmont* case. In his answer to that petition for rehearing the Solicitor General said:

> "In *United States* v. *Piedmont Mfg. Co.*, the suit proceeded on the theory that the tax in question was collected on the credit process in 1924, and that the col-

lector then in office was not in office at the time the suit was instituted, *thus bringing the case within the scope of Section 24 (20) of the Judicial Code.* The taxpayer in the instant case (Reeves Bros.) could not proceed on this theory for the collector in office at the time the credit was made, in 1924, was still in office when this suit was filed (R. 6, 11)." (Italics ours)

That distinction cannot be made in the case at bar because in the case at bar the collector who was in office at the time the credit was made in 1924, was not in office when this suit was filed. (R. 3, 13) It, therefore, follows that the decisions of the two circuits are squarely in conflict. If the District Court had jurisdiction in the Piedmont case it has jurisdiction in this case for the facts upon which jurisdiction depends are precisely the same in both cases *i.e.*, the collection was by credit and in both cases the Collector in office when the credit was made was out of office when the suit was begun.

As the Solicitor General stated in the Reeves case in this Court, it was held in the Piedmont case a collection "by the credit process" brought "the case within the scope of Section 24 (20) of the Judicial Code" and as the Sixth Circuit in the instant case has held the contrary and decided that such a collection did not satisfy the requirements of Section 24 (20) of the Judicial Code the two cases are squarely in conflict. In its opinion the Sixth Circuit makes no attempt to answer the convincing arguments advanced in the Piedmont case 89 Fed. (2d) 296 in support of the conclusion there reached.

The question of jurisdiction in cases of this kind is an important one. It will have to be settled sometime and should be settled by this Court in this case. Indubitably it was the intention of Congress to permit taxpayers to sue in the District where they live rather than come to Washington to do so in the Court of Claims. Moreover, if the decision in the case at bar is right and the decision of the Circuit Court of Appeals for the Fourth Circuit is wrong, it seems

Congress will have to enact amendatory legislation for hundreds of collections by credit are made annually.

We respectfully submit that this court should grant the Petition for Certiorari and determine between the conflicting interpretations of the Statute in question.

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